

## DRAFT RULE - VERSION 4

### SECTION 1. 327 IAC 17 IS ADDED TO READ AS FOLLOWS:

#### Rule 1. Section 401 Water Quality Certification Application

##### 327 IAC 17-1-1 General

Authority: IC

Affected: IC

Sec. 1. (a) The purpose of Article 327 IAC 17 is to establish procedures and criteria for the application, processing, and review of state water quality certifications required by section 401 of the federal Clean Water Act, 33 USC § 1341\*. It is the purpose of this article, consistent with the Clean Water Act, to maintain the chemical, physical, and biological integrity of the waters of the state.

(b) It is the policy of the department to achieve no overall net loss of the existing wetlands resource base with respect to wetlands acreage and existing and designated uses in the state.

\*The federal Clean Water Act is incorporated by reference. Copies of this law may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-1-1*)

##### 327 IAC 17-1-2 Applicability

Authority: IC

Affected: IC

Sec. 2. (a) This article governs the issuance of state certifications by the department under section 401 of the Clean Water Act, 33 USC §1341.

(1) Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities that may result in any discharge into navigable waters of the United States shall obtain, from the state where the discharge originates or will originate, a certification that the discharge will comply with applicable provisions of sections 208(e), 301, 302, 303, 306, and 307 of the Clean Water Act (33 USC §§1311, 1312, 1313, 1316, and 1317).

(2) The certification shall set forth any requirements necessary to assure that the applicant will comply with the applicable provisions of the Clean Water Act and state law, including water quality standards.

(b) Federal permits or licenses to which this rule applies include:

(1) A permit from the U.S. Army Corps of Engineers pursuant to:

(A) section 10 of the River and Harbors Act\*; or

(B) section 404 of the federal Clean Water Act\*\*.

(2) A license issued by the Federal Energy Regulatory Commission (FERC).

\*IBR

\*\*The federal Clean Water Act, 33 U.S.C.A. 1251 to 33 U.S.C.A. 1387 is incorporated by reference. Copies of this law may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-1-2*)

#### 327 IAC 17-1-3 Requirement for certification

Authority: IC

Affected: IC

Sec. 3. No person may conduct an activity that may result in a discharge, that requires a federal permit or license, into waters of the United States unless the person has received a certification or waiver under this article from the department. (*Water Pollution Control Board; 327 IAC 17-1-3*)

#### 327 IAC 17-1-4 Definitions

Authority: IC

Affected: IC

Sec. 4. In addition to the definitions contained in IC 13-11-2, the following definitions apply throughout this rule:

(1) "Applicable provisions of the federal Clean Water Act and state law" include the provisions of sections 301, 302, 303, 306, 307 [33 USC §§ 1311, 1312, 1313, 1316, 1317] and other appropriate provisions of Indiana law, including state water quality standards.

(2) "Commissioner" means the commissioner of the department of environmental management.

(3) "Department" means the department of environmental management.

(4) "Emergent wetland" means areas meeting the U.S. Army Corps of Engineers definition for wetlands which are characterized by erect, rooted, herbaceous hydrophyte, excluding mosses and lichens.

(5) "Enhancement" means the conversion of one wetland type to another with a higher perceived value; it is considered to be an impact to wetland existing and designated uses.

(6) "Farmed wetland" means a wetland that was drained, dredged, filled, leveled or otherwise manipulated before December 23, 1985, for the purpose of, or to have the effect of, making the production of an agricultural commodity possible, and continue to meet specific wetland hydrology criteria.

(7) "Final decision" means a decision by the department to issue, deny, modify, revoke, or waive a section 401 water quality certification.

(8) "Forested wetland" means areas meeting the U.S. Army Corps of Engineers definition

for wetlands which are dominated by woody vegetation that is 6 meters tall or taller.

(9) "Open water" means any waterbody, such as a wetland or stream, where part or all of the surface area is permanently covered with water.

(10) "Practicable alternative" means a different way of configuring a project which is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

(11) "Scrub-shrub wetland" means areas meeting the U.S. Army Corps of Engineers definition for wetlands which are dominated by woody vegetation less than twenty (20) feet tall. This includes true shrubs, young trees, and trees or shrubs stunted by environmental conditions.

(12) "Water dependent" means an activity associated with a discharge requires access, proximity to, or siting within a water body in order to fulfill the basic purpose of the activity.

(13) "Watershed" means the geographic region within which water drains into a particular river, stream or body of water.

*(Water Pollution Control Board; 327 IAC 17-1-4)*

### 327 IAC 17-1-5 Application requirements

Authority: IC

Affected: IC

Sec. 5. (a) An application for water quality certification shall be submitted to the department in advance of commencement of the activity and must:

- (1) be on a form approved by the commissioner;
- (2) be complete;
- (3) be legible;
- (4) contain the signed statement required by subsection (b) attesting to the truthfulness of information provided on the application; and
- (5) be signed by the applicant.
- (6) must include a wetland delineation performed in accordance with procedures established by the U.S. Army Corps of Engineers depicting all wetlands on the subject property.

(b) An application required by subsection (a) must contain the following statement signed by the applicant: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(c) If the applicant is a corporation, the application shall contain the name of the individual who shall be primarily responsible for the project that is to be certified.

(d) Where the department determines that more information is required in order to accomplish the review of the request for certification, it shall promptly notify the applicant and request such information. The application shall not be considered complete until the applicant has submitted the requested information.

(e) Upon receipt of a complete application, the department shall act upon the request for certification within one (1) year. If the department fails to act within one (1) year, then the certification may be deemed waived unless the federal permitting agency, in its discretion, accepts the certification after such time period has passed.

(f) The applicant has the burden of proving that its activity will comply with the applicable provisions of the federal Clean Water Act and state law. (*Water Pollution Control Board; 327 IAC 17-1-5*)

### 327 IAC 17-1-6 Public notice of water quality certification applications

Authority: IC

Affected: IC

Sec. 6. (a) The commissioner shall provide public notice and an opportunity to comment on applications submitted to the department for water quality certification under section 401 of the Clean Water Act.

(b) The public notice shall contain the following information:

- (1) The applicable statutory and regulatory authority.
- (2) The name and address of the applicant and the applicant's agent, if any.
- (3) The name, address, and telephone number of the department's employee who may be contacted concerning the application.
- (4) The location of the proposed project.
- (5) A brief description of the proposed project, including the following:
  - (A) Its purpose and intended use.
  - (B) A description of structures, if any are to be erected.
  - (C) A description of the type, composition, and quantity of materials to be disposed of or discharged.
  - (D) Possible impacts to wetlands, streams, or other waters of the state.
  - (E) A description of the compensatory mitigation proposed by the applicant, if any.
- (6) A statement that the public may view or obtain a copy of the plan and elevation drawing, if reproducible, showing the general and specific site location.
- (7) A statement that the comment period deadline shall be twenty-one (21) calendar days from the date of mailing of the public notice, unless otherwise specified.
- (8) A statement that any person may request in writing that a public hearing or meeting be held to consider the application.

(c) Public notice of an application for water quality certification shall be sent to the following:

- (1) The applicant.

- (2) Landowners adjacent to the proposed activity, as provided by the applicant.
- (3) The following agencies:
  - (A) Indiana department of natural resources.
  - (B) U.S. Environmental Protection Agency.
  - (C) U.S. Fish and Wildlife Service.
  - (D) The state or federal agency responsible for issuing water quality certification in a state whose water quality may be adversely affected by a proposed activity.
- (4) Any person who requests copies of public notices.

(d) Comments received by the department during the public notice comment period shall be considered by the department. The department may choose to forward comments received during the comment period to the applicant for a response. If the department chooses to forward comments, it must do so within three (3) working days after the close of the comment period, sent to the applicant via certified mail. The applicant shall then provide the department with a written response to all comments forwarded by the department at the close of the comment period within fourteen (14) days of receipt of comments. If an applicant requires additional time to respond to comments, the applicant may inform the department in writing within the 14 day time period. The department shall then place the application on hold until the applicant provides a response. The department may deny certification if the applicant fails to provide a written response to comments as stipulated in this paragraph.

(e) The department shall issue a supplemental public notice of an application in the event of one (1) of the following:

- (1) The proposed project originally was denied water quality certification but the applicant has submitted a new or modified proposal.
- (2) The proposed project has significantly changed since the application was originally public noticed and the department received comments from the public on the project as originally proposed.
- (3) The recipient of a water quality certification requests a modification of the certification.

(f) The department may issue a supplemental public notice for a project that has been significantly changed since the issuance of the first public notice but no public comment was received about the project as originally proposed.

(g) In lieu of the public notice issued by the department according to this section, a joint public notice shall be issued by the department and the U.S. Army Corps of Engineers (COE) utilizing the public notice procedures set forth in 33 CFR § 325.3, regarding an application for water quality certification concerning a project that requires a COE individual permit. (*Water Pollution Control Board; 327 IAC 17-1-6*)

327 IAC 17-1-7 Public hearing or meeting

Authority: IC

Affected: IC

Sec. 7. (a) A person may request in writing that a public hearing be held to consider issues related to water quality in connection with a specific application for certification. This request should be made during the public comment period and state the reason for requesting the public hearing as specifically as possible.

(b) The department may hold a public hearing if:

- (1) substantial questions are raised;
- (2) new information is obtained about water quality issues; or
- (3) significant interest is expressed in the project.

(c) The department shall publish a public notice of a scheduled public hearing setting forth the date, time, and place. The department shall attempt to locate the public hearing in the vicinity of the proposed project.

(d) Any person may appear and present oral or written comments concerning the proposed project.

(e) The public hearing shall be recorded and a transcript prepared. A copy of the transcript may be purchased from the department or the transcriber of the public hearing. A copy shall be available for public inspection during normal business hours at the department.

(f) The applicant will be encouraged to attend any public hearing.

(g) Any person may request that the department hold a public meeting in lieu of a public hearing.

(h) The department may decide to hold a public hearing or public meeting on its own initiative.

(i) The department shall consider the comments received at the public hearing before a decision is rendered on the application. (*Water Pollution Control Board; 327 IAC 17-1-7*)

## Rule 2. Review of section 401 water quality certification applications

### 327 IAC 17-2-1 Assessment of wetland existing and designated uses

Authority: IC

Affected: IC

Sec. 1. Uses set forth at 327 IAC 2-1.8-4 are presumed to exist in a wetland that meets:

- (1) the definition of a wetland as described in this rule; and
- (2) the criteria set forth by the U.S. Army Corps of Engineers.

(*Water Pollution Control Board; 327 IAC 17-2-1*)

### 327 IAC 17-2-2 Assessment of impacts on water quality

Authority: IC

Affected: IC

Sec. 2. (a) Every attempt must be made by an applicant, regardless of the size, location, or type of project, to analyze and consider all options that would avoid impacts to wetlands or other waters of the state. For each project, the department shall evaluate options for avoidance and may propose additional options to modify a project so as to completely avoid impacts to the waters of the state.

(b) The department shall review a Section 401 water quality certification application to determine if the proposed activity is water dependent. Water dependent and non-water dependent projects that will impact Tier I wetlands or other waters of the state shall meet the requirements of sections 3 and 4, respectively, of this rule. (*Water Pollution Control Board; 327 IAC 17-2-2*)

(c) The department may deny certification if it is determined that:

- (1) significant adverse impacts, including secondary and cumulative impacts, may result from the project; or
- (2) the proposed compensatory mitigation will not successfully replace the impacted existing and designated uses of the wetland; or
- (3) the project will have significant adverse impacts to water quality that cannot be offset with compensatory mitigation, even if alternatives are not available.

327 IAC 17-2-3 Water dependent projects impacting Tier I wetlands and other waters of the state

Authority: IC

Affected: IC

Sec. 3. (a) For a water dependent project that will involve impacts to Tier 1 wetlands and other waters of the state, the following requirements apply:

- (1) The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential adverse impacts on wetlands and other waters of the state.
- (2) The following factors shall be considered by the department to determine if potential impacts to the aquatic ecosystem have been minimized to the fullest extent:

- (A) Spatial requirements of the project.
- (B) Location of existing structural or natural features that may dictate the placement or configuration of the project.
- (C) The purpose of the project and how the purpose relates to placement, configuration, or density.
- (D) The spatial distribution of wetlands and other waters on the site.
- (E) Individual, secondary, and cumulative impacts.
- (F) An applicant's efforts to:
  - (i) modify the size, scope, configuration, or density of the project;
  - (ii) remove or accommodate site constraints including zoning, infrastructure, access, or natural features; and
  - (iii) otherwise minimize impacts.

(b) If the department finds that an applicant has not complied with the requirements of subsection (a) to minimize wetland impacts, the department shall deny water quality certification for the proposed project.

(c) For wetland impacts one-tenth (0.1) of an acre or less in size, the department may require appropriate compensatory mitigation in accordance with the following:

- (1) Compensatory wetland mitigation shall be required if the impact exceeds one-tenth (0.1) of an acre of wetland.
- (2) Compensatory wetland mitigation must replace all adversely impacted existing and designated uses in accordance with the provisions set forth in 327 IAC XXX.
- (3) The following factors shall be considered in determining if a proposed project will have a significant impact on water quality:
  - (A) If the project involves the maintenance, repair, or rehabilitation of existing man-made structures, excluding drainage ditches.
  - (B) The secondary and cumulative impacts of the project.
  - (C) The proximity of the proposed impact to other water bodies.
  - (D) The duration of the activity associated with the project.
  - (E) The plant species diversity and fish and wildlife habitat components of the wetland to be impacted.

(d) For all other waters of the state, the department may require appropriate compensatory mitigation for all remaining impacts in accordance with the following:

- (1) Compensatory mitigation must replace all adversely impacted existing and designated uses in accordance with the provisions set forth in 327 IAC XXX.
- (2) The following factors shall be considered in determining if a proposed project will have a significant impact on water quality:
  - (A) If the project involves the maintenance, repair, or rehabilitation of existing man-made structures, excluding drainage ditches.
  - (B) The secondary and cumulative impacts of the project.
  - (C) The proximity of the proposed impact to other water bodies.
  - (D) The duration of the activity associated with the project.
  - (E) Whether the project involves the relocation, realignment, or channelization of an existing stream.
  - (F) Whether the project would reduce or control an environmental problem or a threat to the environment.

*(Water Pollution Control Board; 327 IAC 17-2-3)*

327 IAC 17-2-4 Non-water dependent projects impacting Tier I wetlands and other waters of the state

Authority: IC

Affected: IC

Sec. 4. (a) For a non-water dependent project that will involve impacts to Tier I wetlands and other waters of the state, the following requirements apply:

- (1) The department shall not grant certification if there is a practicable alternative to the



proposed discharge that would have less impact on wetlands and other waters of the state.  
(2) Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise.

(b) Compensatory mitigation is not considered an alternative for the purposes of this section. In evaluating alternatives required by subsection (a), the department shall consider the following:

- (1) Documentation provided by the applicant describing:
  - (A) the no-build alternative, that would avoid impacts to wetlands, excepting repair or rehabilitation projects on existing infrastructure where only one (1) alternative is required; and
  - (B) consideration of alternate sites or alternative project configurations on the proposed site.
- (2) The alternatives must be judged by the department as good faith efforts, or the department may require the applicant to redraft them for reconsideration.

(c) The department shall consider the following in evaluating practical alternatives as applicable:

- (1) Whether the basic project purpose could be reasonably accomplished using one (1) or more other sites in the same general area that would avoid wetland impacts.
- (2) Whether an alternate site has been excluded from consideration because it includes or requires an area not owned by the applicant though that area could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project.
- (3) The general suitability of alternate sites considered by the applicant.
- (4) Whether reasonable modification of the size, scope, configuration, or density of the project would avoid impacts to wetlands.
- (5) Efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments.

(d) Avoidance shall be required when the proposed project would impact an Outstanding State or National Resource Water, or other specially designated high quality water unless the impact is short term or temporary. In no case shall an impact and its effects be allowed for a period of time greater than one (1) year from the date the project begins.

(e) The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential impacts on wetlands or other waters of the state. The following factors shall be considered by the department to determine if potential impacts to the aquatic ecosystem have been minimized to the fullest extent:

- (1) Spatial requirements of the project.
- (2) Location of existing structural or natural features that may dictate the placement or configuration of the project.
- (3) The purpose of the project and how the purpose relates to placement, configuration, or density.
- (4) The spatial distribution of wetlands and other waters on the site.

- (5) Individual, secondary, and cumulative impacts.
- (6) An applicant's efforts to:
  - (A) modify the size, scope, configuration, or density of the project;
  - (B) remove or accommodate site constraints including zoning, infrastructure, access, or natural features; and
  - (C) otherwise minimize impacts.

(f) If the department finds that an applicant has not complied with the requirements of subsection (e) to minimize wetland impacts, the department shall deny water quality certification for the proposed project.

(g) For wetland impacts one-tenth (0.1) of an acre or less in size which have not been minimized or avoided, the department may require appropriate compensatory mitigation in accordance with the following:

- (1) Compensatory wetland mitigation shall be required if the impact exceeds one-tenth (0.1) of an acre of wetland.
- (2) Compensatory wetland mitigation must replace all adversely impacted existing and designated uses in accordance with the provisions set forth in 327 IAC XXX.
- (3) The following factors shall be considered in determining if a proposed project will have a significant impact on water quality:
  - (A) If the project involves the maintenance, repair, or rehabilitation of existing man-made structures, excluding drainage ditches.
  - (B) The secondary and cumulative impacts of the project.
  - (C) The proximity of the proposed impact to other water bodies.
  - (D) The duration of the activity associated with the project.
  - (E) The plant species diversity of the wetland to be impacted.

(h) For all other waters of the state, the department may require appropriate compensatory mitigation for all remaining impacts in accordance with the following:

- (1) Compensatory mitigation must replace all adversely impacted existing and designated uses in accordance with the provisions set forth in 327 IAC XXX.
- (2) The following factors shall be considered in determining if a proposed project will have a significant impact on water quality:
  - (A) If the project involves the maintenance, repair, or rehabilitation of existing man-made structures, excluding drainage ditches.
  - (B) The secondary and cumulative impacts of the project.
  - (C) The proximity of the proposed impact to other water bodies.
  - (D) The duration of the activity associated with the project.
  - (E) Whether the project involves the relocation, realignment, or channelization of an existing stream.
  - (F) Whether the project would reduce or control an environmental problem or a threat to the environment.

*(Water Pollution Control Board; 327 IAC 17-2-4)*

327 IAC 17-2-5 Impacts to Tier II waters or specially designated water bodies

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Authority: IC

Affected: IC

Sec. 5. (a) For a project that will involve an impact to a Tier II wetland, designated according to 327 IAC 2-X-X, or specially designated water bodies, the following requirements apply:

- (1) The department shall provide an opportunity for public comment and inter-governmental coordination regarding the proposed project.
- (2) The applicant shall prepare and submit an antidegradation demonstration in accordance with 327 IAC 2-1.8-2 upon determination by the department that the project may impact a Tier II wetland. This antidegradation demonstration shall include the following:
  - (A) An evaluation of the baseline economic condition of the county in which the project is proposed to be located, including:
    - (i) the unemployment rate in the county;
    - (ii) the population of the county;
    - (iii) the average household income relative to state and national averages; and
    - (iv) the percent of the population living below the poverty level.
  - (B) Information on the anticipated net positive impacts attributable to the proposed activity in the county where the project will be located, including:
    - (i) the increase in employment or avoidance of a reduction in employment;
    - (ii) the reduction in the local unemployment rate attributable to the proposed project;
    - (iii) the total, annual, new payroll of resident non-officers for the new or increased employment and the average wages for the new non-officer employees or, in lieu of this information, the applicant may provide other information that quantifies the extent of the economic benefit to be provided to the area;
    - (iv) the increased net tax revenues;
    - (v) the increase in production level, if applicable;
    - (vi) the increase in efficiency, if applicable; and
    - (vii) the extent that an environmental or public health problem shall be corrected.
  - (C) An identification of the potential adverse environmental or public health impacts attributable to the proposed project, including:
    - (i) an identification of the:
      - (AA) potential impact on the aquatic community;
      - (BB) endangered or threatened species potentially impacted by the proposed project;
      - (CC) characteristics of the water body proposed to be impacted that are unique or rare within the locality or state potentially impacted by the proposed project; and
      - (DD) government or privately sponsored projects that have specifically targeted improved water quality or enhanced recreational opportunities within the fourteen (14) digit watershed

- containing the waterbody proposed to be impacted;
- (ii) the location of the nearest, potentially affected public water supply intake, if any; and
- (iii) the potential impact on:
  - (AA) groundwater recharge;
  - (BB) recreation, aesthetics, and scientific research;
  - (CC) shoreline or streambank erosion protection; and
  - (DD) natural, regional, stormwater detention or retention.

(b) The applicant shall demonstrate that all alternatives to the proposed project have been considered and satisfy the following conditions:

- (1) Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise.
- (2) Compensatory mitigation is not considered an alternative for the purposes of this section.

(c) In evaluating alternatives required by subsection (b), the department shall consider the following:

- (1) Documentation provided by the applicant describing:
  - (A) the no-build alternative, that would avoid impacts to wetlands, excepting repair or rehabilitation projects on existing infrastructure where only one (1) alternative is required; and
  - (B) consideration of alternate sites or alternative project configurations on the proposed site.
- (2) The alternatives must be judged by the department as good faith efforts, or the department may require the applicant to redraft them for reconsideration.

(d) The department shall consider the following in evaluating practical alternatives as applicable:

- (1) Whether the basic project purpose could be reasonably accomplished using one (1) or more other sites in the same general area that would avoid wetland impacts.
- (2) Whether an alternate site has been excluded from consideration because it includes or requires an area not owned by the applicant though that area could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project.
- (3) The general suitability of alternate sites considered by the applicant.
- (4) Whether reasonable modification of the size, scope, configuration, or density of the project would avoid impacts to wetlands.
- (5) Efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments.

(e) The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential impacts on the aquatic ecosystem.

(f) The following factors shall be considered by the department to determine if potential

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impacts to the aquatic ecosystem have been minimized to the fullest extent:

- (1) Spatial requirements of the project.
- (2) Location of existing structural or natural features that may dictate the placement or configuration of the project.
- (3) The purpose of the project and how the purpose relates to placement, configuration, or density.
- (4) The spatial distribution of wetlands and other waters on the site.
- (5) Individual, secondary, and cumulative impacts.
- (6) An applicant's efforts to:
  - (A) modify the size, scope, configuration, or density of the project;
  - (B) remove or accommodate site constraints including zoning, infrastructure, access, or natural features; and
  - (C) otherwise minimize impacts.

(g) The department shall deny water quality certification for a proposed project for any of the following reasons:

- (1) An applicant does not comply with the requirements of this section to avoid and minimize wetland impacts.
- (2) The project fails to provide important social and economic need.
- (3) The project would cause adverse environmental or public health impacts.

(h) Compensatory mitigation may be allowed if no other practicable alternative exists for a project impacting a Tier II wetland and the department approves an antidegradation demonstration, as required by subsection (a)(2). The applicant shall be notified of the approval in writing and shall comply with the following:

- (1) Compensatory mitigation must be
  - (A) completed; and
  - (B) demonstrated to the department as being successful in replacing all adversely impacted wetland existing and designated uses before work may proceed on any aspect of the project.

(i) A proposed project that would impact an Outstanding State or National Resource Water or other specially designated high quality water shall be required to avoid causing an impact unless the impact:

- (1) is short term or temporary; and
- (2) lasts less than one year from the date the project begins.

*(Water Pollution Control Board; 327 IAC 17-2-5)*

### 327 IAC 17-2-6 Emergency issuance of a Section 401 water quality certification

Authority: IC

Affected: IC

The department:

- (1) may issue an emergency water quality certification if:

- (A) an unacceptable and immediate threat to human life, water quality, or waters of the state, including wetlands, may occur; or
- (B) a severe loss of property may result before a water quality certification could be issued in accordance with normal procedures according to this article;
- (2) shall issue a public notice regarding an emergency issuance of a water quality certification no later than ten (10) days after the issuance that:
  - (A) states the reasons for the issuance; and
  - (B) complies with the requirements of 327 IAC 17-1-6; and
- (3) shall incorporate in an emergency water quality certification all standards and criteria that would normally be applied to a project not being reviewed under the emergency provision of this section.

*(Water Pollution Control Board; 327 IAC 17-2-6)*

327 IAC 17-2-7 Review of Corps of Engineers general permits, including NWPS, letters of permission (LPs), and Programmatic General Permits (PGPs)

Authority: IC

Affected: IC

- (a) The department shall use:
    - (1) the review procedures set forth in this rule; and
    - (2) the public notice procedures according to 327 IAC 17-1-6
- when considering a decision to grant or deny water quality certification for a new or proposed Corps of Engineers general permit, including NWPS, letters of permission (LPs), and PGPs

(b) A water quality certification granted by the department for a general permit shall prohibit the use of the general permit in waters that have a Tier II or greater designation.

(c) The department may propose modifications or revisions to a proposed Corps of Engineers general permit in order to protect water quality. *(Water Pollution Control Board; 327 IAC 17-2-7)*

327 IAC 17-2-8 Procedures for review of projects located within interstate waters

Authority: IC

Affected: IC

- (a) The department shall fulfill the following requirements when in receipt of an application for a project to be located within interstate waters:
  - (1) Notification of receipt of the project application is to be provided to the U.S. EPA, Region V, office.
  - (2) The administrator of the water pollution control agency in other states to be affected by the project shall be:
    - (A) supplied with a copy of the department's public notice issued regarding the project; and
    - (B) granted sixty (60) days after receipt of the department's public notice, required by clause (A), to notify the department in writing:

- (i) of a determination that the project will affect the quality of the water in the affected state so as to violate a water quality requirement;
  - (ii) to object to the issuance of a license or permit; and
  - (iii) to request a public hearing on the objection of the affected state.
- (3) The department shall conduct a public hearing, according to 327 IAC 17-1-7, based upon an objection from another state made in response to subdivision (2)(B).

(b) A license or permit issued by the department, for a project to be located within interstate waters, shall be conditioned to insure compliance with applicable water quality requirements of both Indiana and other states affected by the project. If the imposition of conditions cannot insure compliance with requirements of each affected state, then the department shall not issue a water quality certification for the proposed project. (*Water Pollution Control Board; 327 IAC 17-2-8*)

### 327 IAC 17-2-9 Compliance

Authority: IC

Affected: IC

(a) The commissioner, or an authorized representative of the department possessing official identifying credentials to be presented upon demand, may inspect the following:

- (1) A proposed project site.
- (2) A site where a water quality certification has been granted, denied, or waived.
- (3) A site where a violation of an applicable water quality standard is known or is potentially suspected.

(b) A cease and desist order shall be:

- (1) issued, as a result of a violation found during an inspection done according to subsection (a), to each responsible party;
- (2) either written or verbal, with a verbal order followed, within three (3) working days of observation of the violation, by a written order sent to each responsible party; and
- (3) specific as to the applicable law or laws that have been violated and the reasons for the stop work order.

(c) A cease and desist order shall remain in effect until a responsible party has satisfied one (1) of the following requirements:

- (1) All necessary authorizations from applicable agencies have been obtained.
- (2) The department concurs in writing that the site has been restored to its pre-violation condition.
- (3) Has proven to the department's satisfaction that the activity does not violate any applicable law or regulation.

(d) The department, upon discovery of an unauthorized activity, whether found through inspection or other means, shall take one of the following actions:

- (1) Require the applicant submit an application for the unauthorized activity which will be reviewed by the department according to this rule.

- (2) Issue an unilateral restoration order, which shall contain:
- (A) a written statement of the actions the responsible party must take to remediate adverse impacts to the environment that have resulted or could result from the unauthorized activity;
  - (B) a timetable to complete the actions required by clause (A); and
  - (C) a stipulation of possible, further penalties for failure to comply with the restoration order.

This order shall not abridge the department's rights under IC 13-30 to seek additional penalties or corrective actions. (*Water Pollution Control Board; 327 IAC 17-2-9*)

#### 327 IAC 17-2-10 Expiration date of Section 401 water quality certification

Authority: IC

Affected: IC

- (a) A water quality certification granted or waived by the department shall:
- (1) be effective for two (2) years from the date of issuance; and
  - (2) require reapplication if work has not commenced within wetlands or other waters by the end of two (2) years.
- (b) A water quality certification granted by the department for a Corps of Engineers general permit or letter of permission shall:
- (1) be effective for the duration of the Corps of Engineers permit;
  - (2) not be effective beyond five (5) years from the effective date of the Corps of Engineers permit and
  - (3) be rescinded if the department determines the general permit is causing or contributing to adverse impacts to water quality.

(*Water Pollution Control Board; 327 IAC 17-2-10*)

### Rule 3. Compensatory mitigation of Water Quality Impacts

#### 327 IAC 17-3-1 Time for performing compensatory mitigation

Authority: IC

Affected: IC

Sec. 1. (a) Compensatory mitigation shall be required for all unavoidable impacts to waters of the state unless it is determined by the commissioner that the project will not adversely impact water quality.

(b) Compensatory mitigation shall be constructed and proven successful before the proposed impact will be allowed to affect:

- (1) A Tier II wetland.
- (2) A wetland where the applicant does not guarantee compensatory mitigation with a performance bond or irrevocable letter of credit as specified in 327 IAC 17-3-3.

(2) Compensatory mitigation shall be performed in all other cases within one (1) year of



the date of issuance of the section 401 certification unless a written extension is granted by the Commissioner.

*(Water Pollution Control Board; 327 IAC 17-3-1)*

### 327 IAC 17-3-2 Location of compensatory mitigation

Authority: IC

Affected: IC

Sec. 2. (a) If practicable, compensatory mitigation of impacts to all waters of the state should occur on the same site as the location of the project and its associated impacts.

(b) Offsite compensatory mitigation shall be required where the department determines that onsite compensatory mitigation has a low probability of success. One (1) of the following shall be met in providing offsite compensatory mitigation:

(1) An impact being mitigated through the use of a mitigation bank must occur in the mitigation bank's service area as stipulated in the mitigation bank's charter.

(2) Offsite compensatory mitigation not using a mitigation bank shall, to the greatest extent possible, be located within the same fourteen digit United States Geological Survey Hydrologic Unit Code (USGS HUC) as the impact site. If this is not practicable, compensatory mitigation shall be located according to the following restrictions:

(A) An impact to a Tier I wetland shall be mitigated in accordance with the following:

(i) Less than or equal to twenty-five hundredths (0.25) acre of impacted wetlands shall be mitigated within the same USGS HUC eight-digit watershed as the project impact occurs.

(ii) Greater than twenty-five hundredths (0.25) acre of impacted wetlands shall be mitigated within the same USGS HUC eleven-digit watershed as the project impact occurs. If the use of the USGS HUC eleven-digit watershed compromises the quality of the mitigation and a better mitigation option can be identified within the eight-digit watershed, then approval may be granted at the discretion of the Commissioner upon written request from the applicant demonstrating the analysis of mitigation options.

(B) An impact to a Tier II wetland, regardless of size, shall be mitigated within the same USGS HUC fourteen-digit watershed as the project impact occurs.

(c) If a compensatory mitigation site cannot be located in compliance with this rule, then the department shall deny certification for the proposed activity unless an approved mitigation bank is available with a service area encompassing the project location and the bank has appropriate available credits to replace wetland impacts. *(Water Pollution Control Board; 327 IAC 17-3-2)*

### 327 IAC 17-3-3 Future land use of a compensatory mitigation site

Authority: IC

Affected: IC

Sec. 3. (a) The compensatory mitigation site shall be protected in perpetuity through one

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(1) of the following methods:

- (1) A conservation easement held by a third party committed to conservation and maintenance of the property and its wetland existing and designated uses.
- (2) A deed restriction that legally binds the property owner to maintain the property's wetland existing and designated uses.

(b) The conservation easement or deed restriction shall be submitted to the department within sixty (60) days of the date of issuance of the 401 certification.

(c) The applicant may transfer responsibility for the perpetual maintenance of a compensatory mitigation site by submitting to the department a written request which identifies the legally responsible party and a statement from that party that they accept and understand the legal requirements of this transfer. All proposed transfers must be approved in writing by the Commissioner sixty (60) prior to actual transfer.

*(Water Pollution Control Board; 327 IAC 17-3-4)*

#### 327 IAC 17-3-4 Compensatory mitigation ratios; wetlands

Authority: IC

Affected: IC

Sec. 4. (a) The compensatory mitigation ratio to be required for impacts caused to the wetland types found in Table 1 shall be as follows:

Table 1	
Type of wetland to be impacted	Compensatory mitigation to impacted wetland
Open water/emergent	2:1
Scrub/shrub	3:1
Forested	4:1
Tier II Wetlands	1:1
Farmed wetlands	1:1

(b) The compensatory mitigation ratio required by Table 1 may be reduced by the department according to the following:

- (1) The applicant proposes to replace a wetland that the department determines is significantly degraded or adversely altered by human activities with a wetland supporting more uses and greater diversity of vegetation.
- (2) Ratios may be lowered by a factor of up to five-tenths (0.5) for all wetland types except Tier II wetlands and farmed wetlands.
- (3) Ratios may be lowered to 1:1 for any type of wetland where the applicant provides up-

front mitigation which is complete, proven successful, and replicates the wetland uses and community type of the wetland proposed to be impacted.

(4) At the discretion of the Commissioner, ratios may be reduced by a factor of up to one (1) for all wetland types except Tier II wetlands for mitigation plans which propose wetland preservation in accordance with the following:

(A) A net loss of wetland acreage shall be prevented by providing a minimum acreage of wetland restoration, creation, or both that is equal to the acreage of impact.

(B) The area to be preserved meets the qualifications for Tier II classification or greater.

(C) The secondary and cumulative impacts resulting from the impact are insignificant.

(c) In no event shall mitigation ratios be reduced below 1:1.

### 327 IAC 17-3-5 Success criteria for a compensatory mitigation site; wetlands

Authority: IC

Affected: IC

Sec. 5. (a) The department shall require a wetland compensatory mitigation site to meet the following minimum success criteria:

(1) Wetland areas of a compensatory mitigation site shall meet the wetland jurisdictional requirements of the U.S. Army Corps of Engineers.

(2) A limitation of exotic and native nuisance species as determined by an annual survey that provides the following results:

(A) The wetland plant communities are free of the following exotic species, including:

(i) purple loosestrife (*Lythrum salicaria*),

(ii) common reed (*Phragmites australis*); and

(iii) Eurasian water milfoil (*Myriophyllum spicatum*).

(B) The combined aerial coverage of reed canary grass (*Phalaris arundinacea*) and the native nuisance species cattail (*Typha spp.*) shall not cover more than fifteen percent (15%) of a community type.

(3) No more than ten percent (10%) aerial coverage of the compensatory mitigation site may be:

(A) open water;

(B) bare ground, or

(C) a combination of (A) and (B);

unless the applicant provides the department with documentation showing that the natural wetlands the compensatory mitigation site is attempting to recreate have a larger open water or bare ground component or the impacted wetlands contained larger areas of open water or bare ground.

(4) Aerial coverage of the compensatory mitigation site consists of a minimum seventy percent (70%) native vegetation.

(5) Replacement of the existing and designated uses lost at the impacted wetland.

(6) Successful completion of any other goals for the proposed compensatory mitigation set forth as conditions of a granted Section 401 Water Quality Certification.

327 IAC 17-3-6 Monitoring; wetlands

Authority: IC

Affected: IC

Sec. 6. (a) A compensatory mitigation site shall be monitored until the success criteria stipulated in the section 401 certification and in Section 5 of this rule have been achieved for at least two (2) consecutive years.

(b) Vegetation monitoring shall occur:

(1) annually between June 1 and October 31; and

(2) within thirty (30) days of the anniversary date of the first monitoring event.

(c) The applicant shall be responsible for monitoring factors necessary to determine when a compensatory mitigation site has achieved the success criteria required. The applicant shall submit a monitoring plan for approval to the department setting forth the factors to be monitored. These factors may include the following:

(1) Vegetation sampling.

(2) Exotic species surveys.

(3) Growth rates for trees and shrubs.

(4) Planted species survival rates.

(5) Macroinvertebrate sampling.

(6) Amphibian sampling.

(7) Wildlife surveys.

(8) Groundwater and hydrology monitoring.

(9) Soils sampling.

(10) Water quality sampling.

(11) Delineation of the jurisdictional extent of wetlands on the site.

(12) As built survey of boundaries, elevations of structures, and topography.

(d) Presence of exotic and native nuisance species in excess of the limits listed in section 5(a)(2)(A) and (B) of this rule shall result in an extension of the monitoring period required by this section to monitor the effectiveness of control measures and gauge the rate of infestation.

(e) The department may allow release from an extended monitoring period required by subsection (d) and the financial assurances required in section 3(a)(2) and (3) if one (1) of the following actions is taken by the applicant:

(1) The infestation of the exotic and native nuisance species is eliminated.

(2) Sufficient funding is provided in a long-term management trust to control the exotic and native nuisance species.

(f) Compensatory mitigation monitoring plans must be approved by the department prior to the commencement of compensatory mitigation activities.

327 IAC 17-3-7 Compensatory mitigation remediation; wetlands

Authority: IC

Affected: IC

Sec. 7. (a) The applicant shall submit a remediation plan to the department within sixty (60) days of one (1) of the following:

(1) The compensatory mitigation site's inability to achieve:

(A) the target hydrology within two (2) growing seasons after completion of construction;

(B) the success criteria at least once within five (5) years; or

(C) the success criteria for two (2) consecutive years within seven (7) years of monitoring.

(2) At least two (2) years of monitoring data show the site trending away from achievement of the success criteria.

(b) A remediation plan shall include the following:

(1) Identification of the problem or problems preventing the compensatory mitigation site from achieving the success criteria.

(2) A course of action to eliminate the problem or problems. For example, a plan may include the following:

(A) Selection of an alternative compensatory mitigation site that is more suitable for the compensatory mitigation required.

(B) Replanting the compensatory mitigation site.

(C) Regrading the compensatory mitigation site.

(D) Construction of an upland buffer around the site.

(E) Herbicide treatment of exotic invasive vegetation.

(c) The applicant shall implement the remediation plan within one (1) calendar year of its approval by the department.

327 IAC 17-3-8 Compensatory wetland mitigation bank usage

Authority: IC

Affected: IC

Sec. 8. Utilization of a mitigation bank shall be allowed by the department if the following are met:

(1) The mitigation bank has been approved by the department.

(2) The applicant has followed the avoidance and minimization requirements of section       .

(3) The compensatory mitigation produced at the bank is determined by the department to compensate for the wetland's existing and designated uses lost at the impact site.

327 IAC 17-3-9 Documentation required for wetland compensatory mitigation plan

Authority: IC

Affected: IC

Sec. 9. (a) A plan describing wetland compensatory mitigation shall be:

(1) prepared by the applicant if wetland compensatory mitigation is required; and

(2) approved by the department before a section 401 certification is granted.

(b) At a minimum, a wetland compensatory mitigation plan shall give details of the following:

(A) Existing conditions at the wetland to be impacted, including the following:

(i) Hydrology.

(ii) Vegetation, including the presences of exotic invasive species.

(iii) Current land use of the project site.

(iv) Surrounding land use.

(v) Soils.

(vi) Topography.

(B) Acreage of impact and compensatory mitigation by wetland type.

(C) Description of compensatory mitigation goals.

(D) Description of compensatory mitigation methods.

(E) Planting lists.

(F) Narrative describing the following:

(i) Planned hydrology.

(AA) Methods and data used to estimate the planned hydrology.

(BB) Planned seasonal high water elevation and depth.

(CC) Planned mean water elevation and depth.

(DD) Planned duration of saturation, inundation, or both.

(ii) Planned vegetation communities developed by using "Classification of Wetlands and Deepwater Habitats of the United States", U. S. Fish and Wildlife Service, Office of Biological Services, FWS/OBS-79/31, (December 1979)\*, to list the wetland community types to be constructed.

(G) Drawings, plans, and maps depicting the planned post-construction state of the compensatory mitigation, at a minimum including the following:

(i) Detailed topographic drawings.

(ii) Cross sectional drawings, depicted in National Geodetic Vertical Datum, including:

(AA) Planned grade elevation.

(BB) Water control elevation.

(CC) Planned mean water elevation.

(DD) Planned seasonal high water elevation.

(iii) Planting plan related directly to water depths.

(iv) Development plan of the property.

(v) Aerial photographs of impact site and compensatory mitigation site prior to construction.

- (vi) General location map.
- (vii) Longitude and latitude of a point in the center of each compensatory mitigation site.

327 IAC 17-3-10 Review of wetland mitigation plans

Authority: IC

Affected: IC

Sec. 10. (a) A compensatory mitigation plan submitted according to section 9 of this rule shall be reviewed by the department to determine if:

- (1) the existing and designated uses lost by impacting an existing wetland will be adequately replaced by the compensatory mitigation;
- (2) the overall probability of success is acceptable in consideration of the following factors:
  - (A) Methods to be used to restore or create wetlands on a proposed compensatory mitigation site.
  - (B) The side slopes or other slopes affecting water pooling on a proposed compensatory mitigation site.
  - (C) The proximity of a proposed compensatory mitigation site to other waters or natural areas.
  - (D) The presence of an exotic plant species on a proposed compensatory mitigation site.
  - (E) The inclusion of a buffer zone around a proposed compensatory mitigation site.
  - (F) The methods to control hydrology on a proposed compensatory mitigation site.
  - (G) The adjacent land use of a proposed compensatory mitigation site.
  - (H) The methods proposed to establish vegetation on a proposed compensatory mitigation site.
  - (I) Long term management of a proposed compensatory mitigation site.

(b) A compensatory mitigation plan shall not be approved if the department determines the plan would not adequately replace lost designated and existing uses of wetlands proposed to be impacted or is not likely to be successful. (*Water Pollution Control Board; 327 IAC 17-3-11*)

327 IAC 17-3-11 Documentation required for monitoring plan and reports; wetlands

Authority: IC

Affected: IC

Sec. 11. (a) The applicant shall submit a monitoring plan before a section 401 certification is issued. At a minimum, a monitoring plan shall provide the following:

- (1) Description of the compensatory mitigation goals.
- (2) Criteria that must be met to achieve those goals.
- (3) Methods for evaluating the success of compensatory mitigation.
- (4) Map of sample points.

(5) Monitoring schedule.

(b) The applicant shall submit monitoring reports to the department as required by conditions specified by the section 401 certification. At a minimum, a monitoring report shall provide the following:

- (1) IDEM identification number (IDEM ID #).
- (2) U.S. Army Corps of Engineer's Number.
- (3) Project description.
- (4) Reprint of the monitoring plan as required by subsection (a).
- (5) Results of monitoring.
- (6) Discussion of the compensatory mitigation's progress.
- (7) Photographic documentation.
- (8) Graphics depicting the development of plant communities and hydrologic levels illustrating the compensatory mitigation's progress over the monitoring period relative to the success criteria.
- (9) A post construction report of the compensatory mitigation site which establishes baseline conditions at the compensatory mitigation site detailing final contours, wetland plantings, seedings, and a summary of changes in hydrology.

327 IAC 17-3-12 Financial responsibility concerning compensatory wetland mitigation

Authority: IC

Affected: IC

Sec. 12. (a) Compensatory mitigation for Tier 1 wetlands as defined in 327 IAC 2-1.8 shall be guaranteed by one (1) of the following before impacts are made:

- (1) Completion and proven successful prior to impacts.
- (2) A performance bond covering the cost of construction and any outstanding liens on the property.
- (3) An irrevocable letter of credit covering the cost of construction and any outstanding liens on the property.

(b) Compensatory mitigation for Tier II wetlands as defined in 327 IAC 2-1.8 shall be proven successful prior to impacts.

(c) The applicant shall be released from the required financial assurances of subsection (a) when:

- (1) the compensatory mitigation has achieved success criteria according to section 5 of this rule for at least two (2) consecutive years; and
- (2) the department releases the compensatory mitigation from monitoring required by section 6 of this rule.

*(Water Pollution Control Board; 327 IAC 17-3-3)*

327 IAC 17-3-13 Requirements for mitigation for waters other than wetlands

Authority: IC



Affected: IC

Sec. 13. (a) Compensatory mitigation may be required for any project which meets any of the following criteria:

- (1) The relocation of any stream, river or ditch channel which exceeds 300 linear feet.
- (2) The shaping or other alteration of the banks of any stream, river, or ditch which exceeds 300 linear feet.
- (3) The conversion of any stream, river or ditch channel to a closed pipe, hardened ditch, or other such water conveyance structure which exceeds 300 linear feet.
- (4) Filling or conversion of open water areas exceeding one-tenth (0.10) of an acre.

(b) The department shall require mitigation unless the applicant demonstrates the project will not have an adverse impact on water quality of the waterbody.

(c) The department may require compensatory mitigation for impacts to rivers, stream and other waters except wetlands less than 300 linear feet in size. In these cases mitigation shall focus on the replacement of impacted riparian corridors, shoreline structure, or bank stability. Examples of this type of mitigation include:

- (1) Replanting of native vegetation in buffer strips.
- (2) Use of seedings or plantings to enhance the stability of streambanks.
- (3) Creation of aquatic habitat structures along streambanks or riparian areas.

327 IAC 17-3-14 Success criteria for a compensatory mitigation sites for waters other than wetlands

Authority: IC

Affected: IC

Sec. 14. (a) The department shall require compensatory mitigation for waters other than wetlands to meet the following minimum success criteria:

- (A) For reconstructed or relocated channels:
  - (i) support a community of fish species equal to or greater in diversity than the original channel;
  - (ii) be comparable to the grade, hydraulic capacity, and basic channel geometry of the channels to be impacted.
- (B) For streambanks and riparian corridors:
  - (i) the riparian corridor of a relocated stream meets or exceeds the original Qualitative Habitat Evaluation Index (QHEI) scores;
  - (ii) the streambanks and bottom are stable; and
  - (iii) no additional structural improvements or corrections are needed to maintain stream structure or bank stability.
- (C) Successful completion of the goals of the proposed compensatory mitigation as set forth in the approved mitigation plan.
- (D) Successful replacement of all existing and designated uses of the waterbody.

*Water Pollution Control Board; 327 IAC 17-3-5)*

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327 IAC 17-3-15 Compensatory mitigation monitoring for waters other than wetlands

Authority: IC

Affected: IC

Sec 15. (a) A compensatory mitigation site shall be monitored until the success criteria stipulated in the section 401 certification and in Section 14 of this rule have been achieved for at least two (2) consecutive years.

(b) The applicant shall be responsible for monitoring factors necessary to determine when a compensatory mitigation site has achieved the success criteria required. These factors will generally include:

- (1) Vegetation sampling
- (2) Fish surveys
- (3) Macroinvertebrate surveys
- (4) Water quality sampling
- (5) As built surveys of boundaries, elevations, condition of structures, and topography
- (6) Surveys of the stability of streambanks and channel bottoms.

(c) Compensatory mitigation monitoring plans must be approved by the department prior to the issuance of Section 401 certification.

327 IAC 17-3-16 Compensatory mitigation remediation for waters other than wetlands

Authority: IC

Affected: IC

Sec. 16. (a) The applicant shall submit a remediation plan to the department within sixty (60) days of any of the following:

- (1) Structural failures.
- (2) Damage from storm events.
- (3) Downward trends in fishery communities which are the result of failed habitat structures within the compensatory mitigation channel.
- (4) Die-off among plants or other vegetation features.
- (5) At least two (2) years of monitoring data show the site trending away from achievement of the success criteria.

(b) A remediation plan shall include the following:

- (1) Identification of the problem or problems preventing the compensatory mitigation site from achieving the success criteria.
- (2) A course of action to eliminate the problem or problems. For example, a plan may include the following:
  - (A) Addition of structures designed to enhance habitat or stabilize streambanks.
  - (B) Replanting the compensatory mitigation site.

(c) The applicant shall implement the remediation plan within one (1) calendar year of its approval by the department. *Water Pollution Control Board; 327 IAC 17-3-7*

327 IAC 17-3-17 Documentation required for compensatory mitigation plans for waters other than wetlands.

Authority: IC

Affected: IC

Sec. 17. (a) A plan describing compensatory mitigation shall be:

- (1) prepared by the applicant if required by the department; and
- (2) approved by the department before a section 401 certification is granted.

(b) At a minimum, the mitigation plan shall give details of the following:

- (1) An assessment of the reaches of impacted streams within the project area utilizing the Qualitative Habitat Evaluation Index methodology.
- (2) An assessment of the in-stream habitat requirements of fish species that:
  - (A) are noted in the stream assessment required under subdivision (1); and
  - (B) includes a break-down by species of the aspects of stream structure that impact and support the following:
    - (i) Foraging.
    - (ii) Breeding.
    - (iii) Nursery.
    - (iv) Refuge areas.
- (3) Details for the replacement of habitat types, including the following:
  - (A) Specifications for:
    - (i) pools;
    - (ii) riffles; and
    - (iii) in-channel or stream bank habitat structures.
  - (B) Project plans with depictions of the locations of the structures specified under clause (A).
  - (C) An explanation of the construction plans required by clause (B), including:
    - (i) the predicted success of the compensatory mitigation; and
    - (ii) detailed contingency plans if the mitigation proposed under item (i) fails.
  - (D) A construction time schedule specifying the sequence of the construction of the following:
    - (i) the project.
    - (ii) the compensatory mitigation.
- (4) The establishment of control sample points upstream and downstream of the modified channel, noted on plan overview sheets with latitude and longitude coordinates and on aerial photos.
- (5) A description of compensatory mitigation goals.

327 IAC 17-3-18 Review of mitigation plans for waters other than wetlands.

Authority: IC

Affected: IC

Sec. 18. (a) A compensatory mitigation plan submitted according to section 17 of this rule shall be reviewed by the department to determine if:

- (1) the existing and designated uses lost by impacting waters other than wetlands will be adequately replaced by the compensatory mitigation;
- (2) the overall probability of success is acceptable in consideration of the following factors:

- (A) Methods to be used to recreate or rebuild waters other than wetlands at a proposed compensatory mitigation site.
- (B) The construction methods to be used to recreate streambanks or stabilize streambanks.
- (C) The proximity of a proposed compensatory mitigation site to other waters or natural areas.
- (D) The presence of an exotic plant species on a proposed compensatory mitigation site.
- (E) The inclusion of a buffer zone around a proposed compensatory mitigation site.
- (F) The methods to control flow through a proposed compensatory mitigation site.
- (G) The adjacent land use of a proposed compensatory mitigation site.
- (H) The methods proposed to establish vegetation on a proposed compensatory mitigation site.
- (I) Long term management of a proposed compensatory mitigation site.

(b) A compensatory mitigation plan shall not be approved if the department determines the plan would not adequately replace lost designated and existing uses of waters other than wetlands proposed to be impacted or is not likely to be successful.

327 IAC 17-3-19 Documentation required for monitoring plan and reports for waters other than wetlands.

Authority: IC

Affected: IC

Sec. 19. (a) The applicant shall submit a monitoring plan before a section 401 certification is issued. At a minimum, a monitoring plan shall provide the following:

- (1) Description of the compensatory mitigation goals.
- (2) Criteria that must be met to achieve those goals.
- (3) Methods for evaluating the success of compensatory mitigation.
- (4) Map of sample points.
- (5) Monitoring schedule.
- (6) Description of tests and sampling methods required to monitor the development and overall success of the mitigation.

(b) The applicant shall submit a baseline report summarizing the conditions at the site prior to construction, the construction process and the design features to be implemented to restore aquatic habitat.

(c) The applicant shall submit monitoring reports to the department as required by the conditions specified in the Section 401 certification. At a minimum, a monitoring report shall provide the following:

(1) A survey of the grade, shape, and capacity of mitigation to verify that these criteria match the waterbodies that were impacted.

(2) Results obtained using approved sampling protocols beginning at the time the mitigation construction is completed and water is released into the mitigation site including:

(A) Results of any required annual fisheries sampling which:

(i) shall be conducted:

(AA) in July of the year after the release of water into relocated channels;

(BB) from points established through discussions between the applicant and the department; and

(ii) shall provide results:

(AA) that are in accordance with the department's indices of biotic integrity (IBI) protocols and index calculations.

(BB) in accordance with the department's procedures for qualitative habitat evaluation index (QHEI) assessments, conducted at the same points used for IBI sampling. This assessment shall commence on the same schedule and duration as stated in Part B preceding this section.

(b) Annual reports submitted to the department must include the following:

(i) Summary and raw data sheets.

(ii) A narrative overview of the results of the surveys.

(iii) A comparison of the results to the success criteria.

(c) Results of testing and monitoring shall be:

(i) evaluated annually by the department to compare the project to the success criteria; and

(ii) used to determine if additional action or monitoring is warranted.

(d) The department may require the applicant to prepare an annual report of habitat structures and features placed within the channel to assess:

(i) their condition or descriptions of any structural failure within the channels;

(ii) the accumulation of sediment or debris; and

(iii) and any other maintenance issues.

*(Water Pollution Control Board; 327 IAC 17-3-10)*

Rule 4. Issuance, revocation or modification of certification

327 IAC 17-4-1 Departmental action regarding a section 401 certification

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Authority: IC

Affected: IC

Sec. 1. The department shall issue one (1) of the following decisions concerning an application for a section 401 water quality certification after an assessment review completed according to the provisions of 327 IAC 17-1, 327 IAC 17- 2, and 327 IAC 17-3:

- (1) Grant a section 401 water quality certification if the department determines the activity will comply with the applicable provisions of federal and state law.
- (2) Grant a conditional section 401 water quality certification that shall contain conditions and requirements the department deems necessary to ensure that the applicant complies with the applicable provisions of federal and state law.
- (3) Deny a section 401 water quality certification if the activity will not comply with the applicable provisions of federal and state law or if the applicant fails to provide a complete application.
- (4) Waive a section 401 water quality certification if the department has failed to make a final determination within one (1) year of its receipt of a complete application, unless the federal permitting agency chooses to accept a certification subsequent to the expiration of one (1) year.

*(Water Pollution Control Board; 327 IAC 17-4-1)*

327 IAC 17-4-2 Revocation or modification of a section 401 water quality certification

Authority: IC

Affected: IC

Sec. 2. (a) The department may revoke a section 401 water quality certification if one (1) of the following occurs:

- (1) The applicant does not comply with one (1) or more condition of the water quality certification.
- (2) The applicant has caused or is likely to cause a violation of a state water quality standard or other applicable statutory or regulatory requirement.
- (3) The applicant is in violation of one (1) of the following:
  - (A) Construction of compensatory mitigation measures as required by the water quality certification.
  - (B) Construction of the project according to plans or specifications reviewed by the department.
- (4) The applicant has:
  - (A) failed to disclose fully all relevant facts; or
  - (B) misrepresented relevant facts;in the application or during the application process.
- (5) The applicant has failed to submit the monitoring reports or post-construction reports or documents as required by 327 IAC 17-3.

(b) The department:

- (1) may modify an issued water quality certification in accordance with the following:
  - (A) If the department receives a request for a modification which describes

changes or revisions to a project and its associated impacts which was previously granted certification and for which the certification is valid.

(B) To ensure compliance with applicable provisions of federal and state law, because of changes since issuance of the certification, including changes in:

- (i) construction or operation of the project;
- (ii) characteristics of the receiving water;
- (iii) the applicable water quality criteria; or
- (iv) applicable effluent limitations or other requirements of state law.

(2) shall process the application for modification as if it were an original application.

*(Water Pollution Control Board; 327 IAC 17-4-2)*

## Rule 5. Notice and appeal of final decision

### 327 IAC 17-5-1 Notice of final decision

Authority: IC

Affected: IC

Sec. 1. (a) The department shall serve notice of the final decision by certified mail on the applicant and the following persons:

- (1) Those who submitted comments.
- (3) Those who requested notice of the final decision.

(b) A final decision regarding a section 401 water quality certification issued by the department may be appealed in accordance with IC 4-21.5, the Administrative Orders and Procedures Act. A notice of final decision shall include reference to the procedures available to appeal a final decision by requesting an adjudicatory hearing.

(c) A final decision shall become effective fifteen (15) days after service of the mailing is made, unless a petition for review and a petition for stay are filed with the Office of Environmental Adjudication (OEA) within that fifteen (15) day period. The petition for review and the petition for stay must be filed in accordance with IC 4-21.5-3-5. *(Water Pollution Control Board; 327 IAC 17-5-1)*

## Rule 6. Conditions applicable to a section 401 water quality certification

### 327 IAC 17-6-1 Responsibilities

Authority: IC

Affected: IC

Sec. 1. (a) The applicant shall comply with the conditions of the section 401 water quality certification.

(b) Issuance of a section 401 water quality certification does not:

- (1) relieve the applicant of its duty to comply with federal and state law or obtain such other permits or authorizations required to conduct the project;

- (2) authorize injury to persons or private property or invasion of other private rights;
- (3) authorize impacts or activities not detailed in the application; nor
- (4) convey property rights or exclusive privileges.

*(Water Pollution Control Board; 327 IAC 17-6-1)*

#### 327 IAC 17-6-2 Right of entry

Authority: IC

Affected: IC

Sec. 2. (a) The department, upon presentation of proper credentials, shall be allowed by the applicant to do the following:

(1) Enter the following premises:

(A) Property that is the subject of the application, including property that is proposed as compensatory mitigation; and

(B) Property where:

(i) records;

(ii) reports;

(iii) monitoring or treatment equipment or methods;

(iv) samples or other data;

required to be provided or maintained are located.

(2) Have access to and copy the information listed in subdivision (1)(B).

(3) Inspect monitoring, treatment, or operational equipment or facility that is listed in subdivision (1)(B).

(4) Take samples.

(b) The department may authorize an employee of the department or other person under contract with the department to act as its representative.

(c) The department may conduct an inspection to determine compliance with the certification or applicable provisions of federal and state law. *(Water Pollution Control Board; 327 IAC 17-6-2)*

#### 327 IAC 17-6-3 Enforcement

Authority: IC

Affected: IC

Sec. 3. A violation of this article, in part or in whole, may subject a person who causes or contributes to the violation to administrative or judicial proceedings pursuant to IC 13-30.

*(Water Pollution Control Board; 327 IAC 17-6-3)*